

Marciano v Marciano
2011 NY Slip Op 32954(U)
November 1, 2011
Sup Ct, Nassau County
Docket Number: 1287/11
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X PART 8

ROSEMARIE MARCIANO,

Plaintiff,

INDEX NO. 1287/11

-against-

MOTION DATE: 09/14/11

JOHN MARCIANO,

Defendant.

SEQUENCE NO. 001, 002

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Notice of Cross-Motion, Affs & Exs	<u>2</u>
Repy Affirmation	<u>3</u>
Affidavit in Opposition & Reply	<u>4</u>

Upon the foregoing papers, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, pursuant to CPLR §3212, are both denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover upon a promissory note executed by defendant John Marciano and given to the plaintiff to secure the payment of a distributive award owed to the plaintiff as a result of a prior matrimonial action. It is alleged that the defendant has failed to pay the sum due in accordance with the terms of the note and is in default of same.

The defendant executed the promissory note at issue on October 30, 2002, wherein he promised to pay the sum of \$462,500.00 with interest at a rate of 5% per annum from the date of the note through February 1, 2005. The note was due and payable in full on February 1, 2005. The note provided that upon a default, interest would accrue from the date of default through the date of payment, at the lesser rate of 12% per annum or the highest lawful rate permitted by law. The note also provided that it "may not be changed or terminated orally, but only by an agreement in writing signed by the party against whom enforcement of any change, modification, termination, waiver, or discharge is sought."

Plaintiff contends that the defendant defaulted on the payment of the note in accordance

with its terms, and that the full amount of \$462,500, plus interest, remains outstanding. On February 16, 2010, a notice of default was sent to the defendant. Plaintiff attests that the full amount of the loan is outstanding and that she never agreed to change, modify, terminate, waive or discharge the money due to her. Plaintiff submits the promissory note and the notice of default sent to the defendant in support of her motion, as well as emails sent between the parties in February 2010. Plaintiff contends that the emails demonstrate her attempt to collect the monies owed to her from the defendant and the defendant's acknowledgment of same. Accordingly, plaintiff contends that she is entitled to summary judgment.

Plaintiff further argues that the defendant's ten affirmative defenses should be stricken from his answer as they lack merit and evidentiary support.

In opposition and in support of his cross-motion for summary judgment, the defendant attests that the promissory note was fully forgiven by the plaintiff. He attests that the parties entered into an oral agreement whereby in consideration of plaintiff's forgiveness of his obligations under the promissory note, he would continue to maintain child support payments at the same level set forth in the parties' separation agreement and forego any application for a downward modification of support or equitable distribution obligations (despite an alleged decrease in his earnings and net worth) and would also place plaintiff on a health insurance plan in October 2008 and make payments for it on her behalf. In addition, defendant attests that he also gave plaintiff a \$50,000 check dated October 17, 2008. Defendant submits a copy of the cancelled check and proof of payment of plaintiff's health insurance costs in support of his contentions. Defendant argues that same is evidence that an oral agreement forgiving the promissory note was entered into between the parties and that he is entitled to summary judgment dismissing the plaintiff's action.

In response to the defendant's arguments, plaintiff argues, *inter alia*, that she never forgave or orally modified the terms of the promissory note, that the defendant has not paid child support since October 2008 and is in arrears, that the value of the money owed on the promissory note far exceeds that of the payments made for her health insurance, and that the emails from February 2010 evidence the defendant's acknowledgment of his obligations under the promissory note and evidence her intention to collect upon the note. She further contends that the emails demonstrate that there was no modification or forgiveness of the promissory note.

As there is a question of fact as to whether or not an oral modification or agreement was entered into whereby the plaintiff agreed to forgive the defendant's obligations under the promissory note in exchange for health insurance payments and an agreement by the defendant not to modify the previous child support payments, both the plaintiff's motion and the

defendant's cross-motion must be denied. In the instant matter, while the evidence submitted by the defendant is insufficient to create a prima facie showing that an oral modification of the promissory note was entered into between the parties, the evidence submitted is sufficient to create a question of fact regarding same. (*See, Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 397 N.Y.S.2d 922 (1977); *Marine Midland Bank v. Midstate Lumber Co.*, 79 A.D.2d 783, 435 N.Y.S.2d 78 (3d Dept. 1980); *Travis v. Fallani & Cohn*, 292 A.D.2d 242, 739 N.Y.S.2d 675 (1st Dept. 2002)). Although the language within the promissory note states that the agreement may only be modified in writing, a contractual prohibition against oral modification may itself be waived. (*Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 397 N.Y.S.2d 922 (1977); *Travis v. Fallani & Cohn*, 292 A.D.2d 242, 739 N.Y.S.2d 675 (1st Dept. 2002)). If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

With respect to plaintiff's arguments that the ten affirmative defenses asserted by the defendant in his answer should be stricken, the defendant's first, second, third, and fourth affirmative defenses are hereby dismissed, as said defenses lack merit and have no foundation in law or fact. A party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit. (CPLR §3211(b)). Affirmative defenses which fail to set forth facts that are sufficient in law against the plaintiff are properly dismissed. (*See, CPLR §3211(b); Chicago Dressed Beef Co. v. Gold Medal Packing Corp.*, 22 A.D.3d 1010, 254 N.Y.S.2d 717 (4th Dept. 1964)).

Defendant's first affirmative defense that the court failed to acquire personal jurisdiction over the defendant has no merit as the plaintiff has submitted evidence that the defendant was properly and timely served with the summons and complaint. There has been no evidence submitted to the contrary and said defense cannot be supported in law or fact.

Defendant's second affirmative defense that the complaint fails to state a cause of action also cannot be supported in law or fact. In considering a motion to dismiss for failure to state a cause of action, the court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*Brooks v. Key Trust Co. Nat'l. Ass'n*, 26 A.D.3d 628 (3d Dept. 2006), *quoting, EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005)). In doing so, the Court determines only whether the facts as alleged fit within any cognizable legal theory. (*Id, quoting, Leon v. Martinez*, 84 N.Y.2d 83, 683

N.E.2d 511 (1994); *see also, Khoury v. Khoury*, 78 A.D.3d 903, 912 N.Y.S.2d 235 (2d Dept. 2010), *citing, Gougenheim v. Ginzberg*, 43 N.Y.2d 268, 372 N.E.2d 17 (1977)). Accepting all of the plaintiff's allegations as true, her complaint sufficiently sets forth a legally recognized cause of action against the defendant herein.

Defendant's third cause of action that the within action is barred by the applicable statute of limitations is without merit. The action was filed by the plaintiff within the six year statute of limitations, and defendant admits same within his cross-motion for summary judgment.

Defendant's fourth cause of action for "lack of consideration" is unsupported in fact or law. Defendant admits within paragraph 22 of his answer that the plaintiff agreed to provide defendant with a Satisfaction of Mortgage to remove a lien that had been placed upon the defendant's Upper Brookville residence which secured the payment of \$1,000,000 owed to plaintiff pursuant to the Separation Agreement of the parties, in exchange for which the balance of the money owed was secured by the promissory note at issue.

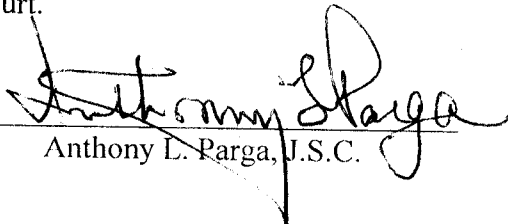
The defendant's fifth through tenth affirmative defenses shall remain, as explanations for same are reasonably contained within defendant's cross-motion.

Plaintiff's request for costs and legal fees is denied as there is no provision for same contained within the promissory note. In addition, the instant action is to collect monies allegedly due and owing on a promissory note, and, as such, Domestic Relations Law §237 does not apply. (*See, Fine v. Fine*, 26 A.D.3d 406, 810 N.Y.S.2d 211 (2d Dept. 2006); *Sandel v. Sandel*, 96 A.D.2d 584, 465 N.Y.S.2d 542 (2d Dept. 1983)).

The parties shall appear for a Preliminary Conference on **December 20, 2011**, at 9:30 A.M. in the Differentiated Case Management Part ("DCM"), Nassau County Supreme Court, to schedule all discovery proceedings. Plaintiff shall serve a copy of this order upon the DCM Case Coordinator of the Nassau County Supreme Court within fifteen (15) days.

This constitutes the decision and order of this Court.

Dated: November 1, 2011


Anthony L. Parga, J.S.C.

Cc: Rita Aniano, P.C.
135 Anchorage Drive
West Islip, NY 11795

Law Offices of Kenneth J. Weinstein, P.C.
100 Garden City Plaza, Suite 408
Garden City, NY 11530

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